

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-06-162**

PANEL: Mr. Mel Myers, Q.C.

APPEARANCES: The Appellant, [text deleted], was not present at the appeal hearing;
Manitoba Public Insurance Corporation ('MPIC') was represented by Ms Danielle Robinson.

HEARING DATE: October 14, 2009

ISSUE(S): Ongoing entitlement to Income Replacement Indemnity ("IRI") benefits which ended on April 2, 2006.

RELEVANT SECTIONS: Sections 110(1)(a) and 160(g) of The Manitoba Public Insurance Corporation Act ('MPIC Act').

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons For Decision

The Appellant was involved in a motor vehicle accident on September 7, 2005 and as a result of the injuries he sustained in the motor vehicle accident was in receipt of IRI benefits.

On April 4, 2006, the case manager wrote to the Appellant advising him that his IRI benefits were terminated in accordance with Sections 110(1)(a) and 160(g) of the MPIC Act.

The Appellant filed an Application for Review dated May 29, 2006.

The Internal Review Officer conducted a hearing on June 16, 2006 and issued a decision on July 5, 2006 confirming the case manager's decision and dismissed the appeal. The Internal Review Officer in her decision stated that on December 15 and 16, 2005, MPIC referred the Appellant to [rehab clinic] for a Multi-Disciplinary Assessment and it was recommended that he attend for a six-week period. In respect of the work hardening program, the Internal Review Officer stated:

“In reviewing the file, I note that your case manager has, in enumerable telephone conversations and meetings with you, warned you of the consequences of your non-compliance with your rehabilitation program. The case manager has also, in writing (January 10, 2006 and February 21, 2006), made it clear to you that should there be a continuation of missed appointments, your PIPP benefits would be in jeopardy, which you have acknowledged to her on more than one occasion that you understood.”

The Internal Review Officer further indicated that the [rehab clinic] discharge report dated April 10, 2006 noted that the Appellant's strength ability at the end of the program to be medium with the vocational recommendations noted as “fit for an immediate, unmodified return to pre-injury employment”. The Internal Review Officer also stated:

“In any event, based upon all medical evidence that is provided as set out above, there are no objective physical findings which would preclude you from performing the duties of your employment.

I am, therefore, confirming your case manager's decision that you are not entitled to further IRI benefits effective April 2, 2006, in accordance with both Section 160(g) and 110(1)(a) of *The Manitoba Public Insurance Corporation Act*.”

Appeal:

The Appellant's Notice of Appeal signed on September 6, 2006 was filed with the Commission on October 6, 2006 by the Claimant Adviser Office. The relevant provisions in respect of the appeal were:

Events that end entitlement to I.R.I.

[110\(1\)](#) A victim ceases to be entitled to an income replacement indemnity when any of the following occurs:

(a) the victim is able to hold the employment that he or she held at the time of the accident;

Corporation may refuse or terminate compensation

[160](#) The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

(g) without valid reason, does not follow or participate in a rehabilitation program made available by the corporation; or

The Commission prepared an index containing all of the relevant documents in respect of this appeal and forwarded copies of the index to both the Claimant Adviser Office and to MPIC on or about July 11, 2007.

No steps were taken by the Claimant Adviser to process the appeal. As a result, on March 11, 2009, the Commission's appeal officer sent a letter to the Claimant Adviser Office, requesting an update as to the status of the appeal and indicating a case conference may be set to review the status of this appeal.

On March 18, 2009 the Claimant Adviser Office sent a letter to the appeals officer advising that the Claimant Adviser Office was currently not in a position to set a date for a hearing and would be able to provide a more precise date in approximately six months' time.

The Commission decided that a case conference was necessary to discuss the status of the appeal. As a result, on August 11, 2009 a notice of a case conference was forwarded by the

Commission to both the Claimant Adviser Office and to MPIC advising that a case conference would be held on October 7, 2009.

The Claimant Adviser advised the Commission in a letter dated October 23, 2009 that following the completion of a review of the Appellant's indexed file on September 24, 2009, the Claimant Adviser attempted to contact the Appellant. The Claimant Adviser further reported to the Commission that he had difficulty contacting the Appellant and did not meet with him until October 2, 2009. The Claimant Adviser further reported that at that time he handed a notice of the case conference set for October 7, 2009 to the Appellant and requested that he attend. The Appellant confirmed to the Claimant Adviser that he would attend the case conference on October 7, 2009 and provided the Claimant Adviser with his cellular phone number.

The Claimant Adviser further stated in this letter that he contacted the Appellant on October 6, 2009 to remind him of the October 7th case conference. The Appellant confirmed again his attendance.

Case Conference Hearing – October 7, 2009:

The case conference commenced on October 7, 2009; the Appellant was represented by [text deleted] of the Claimant Adviser Office. The Appellant did not attend the case conference. MPIC was represented by Ms Danielle Robinson.

The Claimant Adviser advised the Commission that he understood that the Appellant would be attending the case conference. However, the Commission was also advised that the Claimant Adviser Office got in touch with the Appellant on the morning of the case conference hearing,

and the Appellant advised the Claimant Adviser Office that he would not be attending the case conference as he felt it was “a waste of time”.

The Commission adjourned the case conference to October 14, 2009 and made the following requests of the Claimant Adviser:

1. The Claimant Adviser would obtain instructions from the Appellant as to whether or not he wished to proceed with the appeal within one week from October 7, 2009.
2. The Claimant Adviser would advise the Appellant in writing of the adjournment of the case conference to October 14, 2009.
3. The Claimant Adviser would further advise the Appellant that if the Appellant did not attend the case conference on October 14, 2009, the Commission would consider an application by MPIC for dismissal of the Appellant’s appeal on the basis of abandonment and/or on the merits of the appeal.
4. The Claimant Adviser was also to advise the Appellant that if he wished to proceed with the appeal, he would be required to attend the case conference on October 14, 2009 and at that time a specific date for the hearing of the appeal would be set by the Commission.

On October 8, 2009, the Commission received a letter from the Claimant Adviser which in part stated:

“This is to advise the Commission that the Claimant Adviser Office will no longer be representing the above noted Appellant.

Please note that the Appellant has been advised that the Commission has adjourned the case conference for one week and the next case conference has been scheduled for October 14, 2009 at 9:30 a.m. The Appellant has been also advised to attend the case conference, and he has confirmed that he will attend. The Appellant has been further advised that in the event he fails to attend the October 14, 2009 case conference, his appeal will be dismissed on two grounds: abandonment (in the sense that the Appellant

has abandoned the appeal) and merits (in the sense that, based on the balance of probabilities, the Appellant has no case).”

The Claimant Adviser further informed the Commission that the Appellant wished to proceed with the Appeal and as a result, the Claimant Adviser forwarded the indexed file and all relevant correspondence to the Appellant.

Case Conference Hearing – October 14, 2009:

The case conference hearing commenced on Wednesday, October 14, 2009. Ms Danielle Robinson, MPIC’s legal counsel and the Claimant Adviser attended the hearing at the request of the Commission, but the Appellant was not present.

At the request of the Commission, the Claimant Adviser reviewed the contents of his letter to the Commission dated October 8, 2009. The Claimant Adviser stated that the Appellant was personally advised by him that if he did not attend the October 14, 2009 case conference his appeal would be dismissed on the grounds of abandonment and/or on the merits of his appeal.

The Commission requested Ms Robinson to make submissions in respect of the issues relating to the abandonment of the appeal and as well as to the merits of the appeal.

MPIC’s legal counsel submitted that the Commission was entitled to dismiss the Appellant’s appeal on the grounds that the Appellant had abandoned his appeal and had not established on a balance of probabilities that MPIC had incorrectly terminated his IRI benefits.

DISCUSSION

Abandonment of the Appeal:

The Commission reviewed the decision of the Manitoba Court of Appeal in *Fegol v Asper*, 2004 MBCA 115, 2004 CarswellMan 287 (Man. C.A.) in its decision on [text deleted] (File No. AC 06-71), where the Commission stated:

“In that case the Applicant was seeking an order restoring his appeal following its deemed abandonment as a result of the Appellant’s failure to comply with The Court of Appeal Rules (Civil). In arriving at her decision in respect of this application, Madam Justice Steel referred to the decision of Freedman J.A. in *Elias v. Wolf* (2004), 2004 MBCA 99, 2004 CarswellMan 300 (Man. C.A.) and stated:

I also agree with Freedman J.A. in *Elias*, at para. 8, that the appropriate criteria to be considered are those set out in *Bohemier v. CIBC Mortgages Inc.* (2001), 160 Man. R. (2d) 39, 2001 MBCA 161 (Man. C.A.), and are:

1. There must have been a continuous intention to prosecute the appeal from the time when the documents in question should have been properly filed;
2. there must be a reasonable explanation for the failure to file the documents; and
3. there must be arguable grounds of appeal.

Madam Justice Steel found that the Appellant had a continuous intention to prosecute the appeal but failed to satisfy the last two (2) criteria and, as a result, dismissed the Appellant’s Application to the Court.”

The Commission finds that the legal principles set out by the Manitoba Court of Appeal in *Fegol v Asper* (*supra*) relating to the issue of abandonment are relevant in this appeal to the issue of whether or not abandonment had occurred. The Commission further finds, based on the evidence before the Commission that the only action the Appellant took in pursuing the appeal was:

1. to file the Notice of Appeal dated September 6, 2006, which the Commission received on October 6, 2006;
2. to arrange to be represented in the appeal by the Claimant Adviser Office on October 6, 2006.

The Commission notes:

1. The indexed material was sent to the Claimant Adviser Office on July 11, 2007.
2. The Commission sent a notice of a case conference dated August 11, 2009 to the Claimant Adviser Office advising that a case conference would be held on October 7, 2009.
3. The Claimant Adviser, in its letter to the Commission dated October 23, 2009, stated that a review of the Appellant's indexed file was not completed until September 27, 2009.
4. The Claimant Adviser further reported in his letter that he had great difficulty in contacting the Appellant to advise him of the October 7, 2009 case conference.

The Commission determines after the Claimant Adviser Office received the indexed material on July 11, 2007, no further steps were taken by either the Appellant or the Claimant Adviser to have the appeal heard by the Commission until receipt of the Commission's notice of a case conference dated August 11, 2009.

The Commission therefore finds that:

1. The Appellant had ample notice to attend the case conferences on October 7, and October 14, 2009.
2. The Appellant advised the Claimant Adviser Office that he would not be attending the case conference hearing on October 7, 2009 because he felt it was "a waste of time".
3. The Appellant was aware that if he failed to attend the October 14, 2009 case conference the Commission may:
 - a) consider whether he had abandoned his appeal

- b) proceed with the hearing of his appeal and issue a final decision.

The Commission requested that the Claimant Adviser provide a written submission in respect of his relationship with the Appellant. MPIC's legal counsel was advised that she would have an opportunity to respond to this submission. The Claimant Adviser sent a submission by fax on October 26, 2009 to the Commission. The Commission provided a copy of the submission to MPIC's legal counsel. MPIC's legal counsel provided a response dated October 27, 2009.

Decision:

The Commission concludes that the Appellant's conduct clearly indicated that he had no continuous intention of processing his appeal. He was warned by the Claimant Adviser on or about October 8, 2009 that he was required to attend the October 14, 2009 case conference and that if he failed to do so the Commission could proceed with dismissing his appeal on the grounds of abandonment and on the merits of the appeal.

The Commission also finds that the Appellant has not provided any reasonable explanation to the Commission for delaying processing of his appeal.

On the respects of the merits of the appeal, the Commission finds that the Appellant did not have any arguable grounds to proceed with the appeal for the following reasons:

1. Without a valid reason he did not follow in the rehabilitation program made available by MPIC and as a result, MPIC was justified in terminating his IRI benefits pursuant to Section 160(g) of the MPIC Act.
2. That based on the medical evidence there are no objective physical findings which would preclude the Appellant from performing his duties of employment, and as a

result, pursuant to Section 110(1)(a) of the MPIC Act, MPIC was justified in terminating his IRI benefits.

In summary, the Commission concludes the Appellant abandoned his appeal for the following reasons:

1. There was not a continuous intention from the Appellant to prosecute the appeal from the time the Appellant filed his Notice of Appeal.
2. The Appellant did not provide a reasonable explanation for delaying the processing of the appeal.

Arguable Grounds of the Appellant's Appeal:

The Appellant did not attend the case conference to challenge the decision of the Internal Review Officer who determined that MPIC was justified in terminating the Appellant's IRI benefits effective April 2, 2006 on the following grounds:

1. On April 2, 2006, the Appellant was capable of holding employment pursuant to Section 110(1)(a) of the Act.
2. The Appellant, without valid reason, didn't follow or participate in a rehabilitation program made available to him by MPIC.

The Commission finds that the medical evidence provided by MPIC established that the Appellant was capable of returning to work as of April 2, 2006. The Appellant provided no medical evidence to contradict MPIC's position in this respect.

The Commission further finds that the evidence filed by MPIC at the Case Conference hearing clearly indicated that the Appellant was warned of the consequences of his non-compliance with

his rehabilitation program and notwithstanding this warning missed a number of appointments and as a result failed to comply with the rehabilitation program.

The Commission therefore finds there were no arguable grounds for the Appellant's appeal.

For these reasons, the Commission finds that MPIC was correct in terminating the Appellant's IRI benefits effective April 2, 2006 pursuant to Sections 160(g) and 110(1)(a) of the MPIC Act. The Commission confirms the Internal Review Officer's decision dated July 5, 2006 and dismisses the Appellant's appeal.

Dated at Winnipeg this 28th day of October, 2009.

MEL MYERS, Q.C.